Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-901

STATE OF OHIO,

Petitioner,

vs.

DONALD L. KORN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

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IN THE

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OCTOBER TERM, 1979

NO. ————

STATE OF OHIO,

Petitioner,

vs.

DONALD L. KORN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

The Petitioner, State of Ohio, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals, First Appellate District of Ohio, entered in this proceeding on April 4, 1979, a motion for leave to appeal having been denied in the Supreme Court of Ohio on September 13, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals for Butler County, First Appellate District of Ohio, is unreported and is appended as Appendix B. The judgment entries of the Supreme Court of Ohio overruling Petitioner's motion for leave to appeal and dismissing said appeal are appended as

Appendix A. An opinion and entry of the Court of Common Pleas of Butler County, Ohio, are appended as Appendix C, and a related case, *Donald Lee Korn* v. *State of Indiana,* is reported at 379 N.E. 2d 444 (Ind. 1978), and is appended as Appendix D.

JURISDICTION

The judgment entries of the Supreme Court of Ohio denying further appellate review were filed on September 13, 1979, and this petition is filed within ninety (90) days of that date, pursuant to Rule 22 (1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I.

Whether and under what circumstances an accused may waive his *Miranda* rights subsequent to an election to consult with counsel prior to questioning by authorities.

II.

Whether *Miranda* v. *Arizona,* 384 U.S. 436 (1966), created a *per se* rule that an accused's original request to consult with counsel prior to questioning at his arrest precludes a state trial court's finding that an express, affirmative waiver of the right to counsel by the accused three days later was valid under all the facts and circumstances of the case, including where the accused did avail himself of counsel as well as advice of family members and a friend, discharged an attorney retained for him, and requested to talk to police who again fully advised the accused of his constitutional rights prior to his waiver and the making of incriminating statements.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V which provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment VI, which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV, Section I:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Relevant Facts:

Respondent, Donald L. Korn, was convicted of the Aggravated Murder of one Mildred Ruth Doench. Certain admissions made by Korn three days after his arrest in the state of Indiana on another charge were used against him at trial.

On July 13, 1974, Mrs. Mildred Ruth Doench was brutally raped and murdered at her rural home near Hamilton, Ohio. Discovered the next day by a friend, the seventy-two year old widow was found lying on the floor with two stab wounds to the heart and two chop wounds

to the face, the latter inflicted with a mattock still deeply imbedded. Autopsy confirmed that rape had been committed upon Mrs. Doench, a retired school teacher.

Having been identified as being in the vicinity of the Doench home under peculiar circumstances on the evening of July 13, 1974, respondent Donald L. Korn was initially considered a suspect and was contacted at his Fairfield, Ohio, home in July or August of 1974 by officers of the Butler County Sheriff's Office. After being fully advised of his rights, Korn declined to discuss the matter with them until he had consulted a lawyer, and the investigators terminated all contact with Korn at that time.

Five months later, on January 27, 1975, Korn was arrested in Jeffersonville, Indiana, for assaulting a young lady in that community. He was fully advised of his rights in accordance with *Miranda* v. *Arizona,* 384 U.S. 436 (1966), by arresting officer Lieutenant Ronald Kemp, both immediately at arrest and again as part of the booking process at police headquarters; at both times Korn indicated he understood his rights, and at headquarters he stated he did not wish to talk at that time, he wanted to contact an attorney first. With that, no further conversation took place between Korn and any investigating officer on January 27th or 28th. Korn did, however, contact his family and attorney in Ohio, and on January 28th Korn visited briefly with certain members of his family and met with a local Indiana attorney, a Mr. Binus.

On the afternoon of January 29th, Major John Bohlen of the Butler County Sheriff's Office went to Jeffersonville and spoke briefly with Korn, who when simply asked if he wanted to talk to Bohlen, denied the Doench slaying and requested Bohlen to call his mother and wife to ar-

range a meeting the next day between the three of them, alone; Bohlen then left for Ohio to do so. Later, Korn was served with warrants charging the stabbing, rape and robbery of an elderly Jeffersonville, Indiana woman (See *Donald Lee Korn* v. *State of Indiana,* Appendix D), and was advised that his rights as given before were still in effect. That evening, Korn asked to see Lt. Kemp, and requested to see, in the following order, his sister, his mother, and wife, and a family friend, first individually and then all together; then he wished to speak with Major Bohlen, and finally Lt. Kemp.

Arrangements were made for the requested meetings to take place, and on January 30, 1975, Korn's family went to Jeffersonville and hired a local attorney, Mr. Lanning, who advised a county jailer that no one was to talk to Korn. Lt. Kemp, being so advised, explained to the family that he and Major Bohlen, as police officers, could not honor Korn's request to see the officers, but did arrange an hour-long private meeting between Korn, the family and friend, lasting until about 2:00 p.m. As the meeting ended and they broke for lunch, the family was discussing whether to continue to retain the attorney, and one indicated in the officers' presence that it was Korn's decision, "and he says he doesn't want an attorney."

The family returned after lunch and at about 4:00 p.m., met with Attorney Lanning for approximately twenty minutes, after which the attorney walked out of the conference room, advised the police that he was discharged, and left the police station. Korn again met with his family, making arrangements to transfer property to his wife and to obtain certain personal items and clothing to be brought to the jail; at 5:30 p.m., the family left for Ohio.

Thereafter, at 6:25 p.m., Korn was advised of his rights

by Major Bohlen and was read a "Waiver of Rights" form, which he said he understood and signed. Korn proceeded to tell his activities on the night of July 13, 1974, but claimed a "blackout" at the point where he drove into Mrs. Doench's driveway. Major Bohlen ceased the interview, Korn requested and attempted to make phone calls to his wife and sister, and drank coffee with Lt. Kemp.

At 8:30 p.m., Korn again advised that he wished to make a statement to Major Bohlen but first wanted to call his wife. Asked by Bohlen what he was going to say, Korn blurted out that he "stabbed Mrs. Doench, got the mattock and laid it in her head." Major Bohlen abruptly ceased the interview with this, and Korn made the requested phone call.

At 8:40 p.m. in a sequence of events that was tape-recorded, transcribed by Major Bohlen to a type-written statement and signed by Korn, (Appendix E), Korn was completely advised of his rights, again signed a waiver form and acknowledged that he understood his rights and wavied them without promise or coercion, and thereafter made a complete confession that he stabbed Mrs. Doench, raped her, and bludgeoned her in the face with the mattock, tracing his route to and from the Doench house on the evening of the homicide.

Moments following the Doench murder confession, Korn spoke to Lt. Kemp, was again advised and waived his rights, and admitted cutting the throat of Dorothy Hendron, an Indiana resident, and raping her. (Appendix D, *Donald Lee Korn* v. *State of Indiana*) Thereafter, he signed each page of the two type-written statements and drew a sketch of the Doench house. Only at the conclusion of the statements did Korn indicate he wanted to have a lawyer.

Significantly, on February 1, 1975, at Korn's request and with his retained attorney's permission, Korn in the presence of his attorneys accompanied law enforcement officers back to Butler County, Ohio to the Doench house, to point out certain locations and trace his route, as he had indicated he would do in his statement of January 30th.

B. Manner in Which the Federal Question was Raised:

The federal question presented herein was originally raised by respondent Korn in a motion to suppress the statements made to Major Bohlen, alleging that the same were involuntary or were otherwise obtained in violation of the rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

In the Court of Common Pleas for Butler County, Ohio, a three-judge panel heard evidence on the motion to suppress and unanimously overruled the motion, filing a detailed Finding of Fact and Conclusion of Law. (Appendix C.) The trial court determined the facts essentially as the state's evidence tended to establish, concluding that the statements were admissible. The statements were used against Korn at trial and conviction resulted.

Respondent Korn reiterated his Federal Constitutional claim, successfully, in the appeal to the Court of Appeals for Butler County, First Appellate District of Ohio. Reversing the trial court's judgment on this issue and ordering a new trial, the appellate court decision was based exclusively on an interpretation of the Federal Constitution and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), or citations to federal cases interpreting *Miranda*. There are no references to state statutory or constitutional grounds. (Appendix B.)

The Supreme Court of Ohio overruled the Petitioner's motion for leave to appeal, which asserted error in the judgment of the Court of Appeals on this federal constitutional question. The issue is therefore properly the subject for review by this Court on writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Ohio Court of Appeals has decided a substantial question of Federal Constitutional law not heretofore determined by this Court, and in a manner not in accord with applicable decisions of this Court.

The questions presented by Petitioner have yet to be directly addressed by this Court, and have been erroneously answered in the court below. Presented unequivocally in this record are the questions of whether a defendant may subsequently waive his right to consult with counsel prior to questioning once he has initially invoked the right to counsel; and specifically, whether the invocation of the right to counsel, *per se,* indefinitely precludes all subsequent questioning by law enforcement officers, even where the initial request is scrupulously honored, where no questioning ensues thereafter and the accused is afforded the opportunity to consult with counsel, family and friends, but where, after three days, the accused chooses to forego available counsel in favor of his desire to talk with police, who issue fresh *Miranda* warnings and the accused makes an informed, voluntary, express waiver of his *Miranda* rights and makes voluntary statements.

The Ohio Court of Appeals, while disavowing a *per se* rule, held that Respondent could not be interrogated subsequent to his election to consult with counsel before questioning at his arrest. All questioning thereafter was barred,

the court below held, by the following passages in *Miranda* v. *Arizona,* 384 U.S. 436, 473-474 (1966):

> Once warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. [Id.]

However, the decision of the Court below did not take note of statements in subsequent paragraphs which indicated that a waiver of *Miranda* rights even after invocation may be effective:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . .
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. [Id. at 475.]

Just such an express waiver exists in the record, (Appendix E), and the trial court had indeed found as fact that the State had met its "heavy burden" of demonstrating this waiver, which had occurred after Korn did exercise the "opportunity to confer with the attorney," and when Korn had, on his own, foregone "the right to have [the attorney] present during any subsequent questioning." Thus, the question as presented in this case is solely one of federal constitutional law.

This Court's decisions after *Miranda* strongly dictate a result contrary to the Ohio Court's literal application of the *Miranda* phrase. The first of such cases is *Michigan* v. *Mosley,* 423 U.S. 96 (1975), dealing with an issue closely akin to the present one, i.e., whether and under what circumstances a defendant may waive his *Miranda* rights subsequent to an election to remain silent. Noting that resolution of the matter turned almost entirely on the interpretation of a similar passage of *Miranda* which states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent," 384 U.S. at 474, this Court observed that either extreme of literal interpretation could lead to absurd and unintended results, and while finding that the passage did not intend merely a momentary pause in interrogation, the *Mosley* decision also concludes,

> Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject . . . . [Id. at 102-3]

Since both the assertion of the right to remain silent and invocation of the right to counsel were described in *Miranda* as equivalent means to ensure the critical safeguard in custodial interrogation i.e., the "right to cut off questioning," it follows that, as in *Mosley,* the invocation of right to counsel *per se* should not operate to indefinitely preclude further conversations, but rather admissibility of subsequent statements should turn, in part, on whether the "right to cut off questioning" is "scrupulously honored." *Id.* at 104.

In *Brewer* v. *Williams,* 430 U.S. 387 (1977), this Court had occasion to review a case where the accused had ob-

tained counsel prior to being in custody; Williams had in fact indicated he was not desirous of giving any information in the absence of his attorney, but during his necessary transportation *incommunicado* from one city to another, detectives intentionally elicited incriminatory statements. This Court emphasized that there was no evidence to support a waiver of the right to counsel, and under the principles of *Miranda* and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), the statements were inadmissible. However, this Court significantly noted:

> The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.
>
> The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not. [430 U.S. at 405-6]

Implicit in this reasoning, as noted in concurrence by Mr. Justice Powell, 430 U.S. at 413, is that "the right to assistance of counsel may be waived after it has attached, without notice to or consultation with counsel."

This Petition presents such a case, where the trial court specifically found that the police officers refrained from coercion and interrogation after the assertion of right to counsel, and that Korn freely on his own initiative chose to waive the rights to counsel and to remain silent, and confessed the crime.

II. The decision of the Ohio court below is in direct conflict with the decision of the highest court of the State of Indiana on the identical facts of the case, and in conflict with decisions of federal courts of appeals.

The most provocative feature of the instant case is that the Supreme Court of Indiana in *Korn* v. *State,* 379 N.E. 2d 444 (Ind. 1978) (Appendix E) has also reviewed the same events and issues in question here, applied federal constitutional law to the case, and held that a confession by Korn to Lt. Kemp on the Indiana stabbing and rape, made just moments after Ohio crime confession, was admissible, and "that the evidence, when viewed as a whole, was sufficient to establish a knowing and voluntary waiver by [Korn] of his right to counsel before questioning." *Id.* at 448.

Here is presented a quite uncommon situation — appellate courts of two sister states, where the analysis is of the same events, the same parties are involved, at the same place and same time, with the same advice given and the same acts constituting discharge of a retained attorney and express waivers of *Miranda* rights by the accused before his confessions. The same federal law is interpreted, but the Ohio conviction falls while the Indiana conviction stands. The juxtaposition shows the compelling necessity that this Court determine the so-called guidelines by which law enforcement officers should conduct their investigations.

It is further instructive to note that the U.S. Courts of Appeals presented with the issue have concluded that the *Miranda* opinion does not create a *per se* proscription of all further interrogation once the person being questioned has indicated a desire to consult with an attorney.

Representative cases concluding that under their particular circumstances, statements made subsequent to a defendant's request for counsel were admissible, that a defendant may waive the right to counsel after he first asserted it, and that *Miranda* did not erect an indefinite or absolute *per se* bar to any further conversation with an accused, are as follows:

FOURTH CIRCUIT: *United States* v. *Grant,* 549 F. 2d 942 (4th Cir. 1977), *cert. denied,* 432 U.S. 908 (1977)

FIFTH CIRCUIT: *United States* v. *Hodge,* 487 F. 2d 945 (5th Cir. 1973) and *Biddy* v. *Diamond,* 516 F. 2d 118 (5th Cir. 1975)

SIXTH CIRCUIT: *United States* v. *Dority,* 487 F. 2d 846 (6th Cir. 1975)

SEVENTH CIRCUIT: *United States* v. *Springer,* 460 F. 2d 1344 (7th Cir. 1972), *cert. denied,* 409 U.S. 873 (1972)

EIGHTH CIRCUIT: *United States* v. *Hauck,* 586 F. 2d 1296 (8th Cir. 1978)

NINTH CIRCUIT: *United States* v. *Pheaster,* 544 F. 2d 353 (9th Cir. 1976), *cert. den. sub. nom. Inciso* v. *United States,* 429 U.S. 1099 (1977) and *United States* v. *Rodrigues-Gastelum,* 569 F. 2d 482 (9th Cir. 1978) (*en banc*)

From the foregoing it appears that the Ohio Court of Appeals has interpreted federal law in complete conflict with all U.S. Courts of Appeals which have decided this issue. This clear and fundamental conflict requires immediate resolution.

CONCLUSION

This Court has twice deferred a definitive ruling as to whether and under what circumstances further questioning of a person may occur subsequent to a request to consult with an attorney. *Michigan* v. *Mosley,* 423 U.S. 96, 102 fn. 7 (1975); *Brewer* v. *Williams,* 430 U.S. 387, 405-406 (1977). Neither case was the appropriate vehicle for clarification of this issue on its own particular facts. In both cases, however, this Court has indicated that even though a suspect might have invoked his Fifth Amendment rights by asking for counsel, it might still be possible that subsequent voluntary statements of the accused, not prompted by insistent custodial interrogation, would be admissible if the State could show they were the product of a voluntary, informed decision of the accused to waive the rights he had asserted. Such a rule is entirely consistent with the purpose of the *Miranda* decision, which concluded:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . .
>
> . . . .
>
> Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. [384 U.S. at 478]

This Court has determined to hear a factually similar case, in *Rhode Island* v. *Innis,* No. 78-1076, *cert. granted,* 59 L.Ed.2d 492 (1979), argued October 30, 1979, where the issue was the suppression of evidence pointed out to police by a defendant after waiving his Miranda rights although he first had requested an attorney. This Petition

presents the more direct issue, whether the full confession to a crime is admissible under similar circumstances.

To resolve the conflicting interpretations of federal law among jurisdictions as to this issue, and to guide the decision and actions of judges, prosecutors and law enforcement officers caught in this conflict, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for Butler County, First Appellate District of Ohio, herein.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 TERM
City of Columbus.) To wit: September 13, 1979

No. 79-730

STATE OF OHIO,
Appellant and Cross-Appellee,

vs.

DONALD L. KORN,
Appellee and Cross-Appellant.

APPEAL AND CROSS APPEAL
FROM THE COURT OF APPEALS
for Butler County

(Received September 18, 1979)

This cause, here on appeal and cross appeal as of right from the Court of Appeals for Butler County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the
Court this ... day of ..... 19..
..... Clerk
..... Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 TERM
City of Columbus.) To wit: September 13, 1979

No. 79-730

STATE OF OHIO,
Appellant and Cross-Appellee,

vs.

DONALD L. KORN,
Appellee and Cross-Appellant.

MOTION/CROSS MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for Butler County

(Received September 18, 1979)

It is ordered by the Court that this motion/cross motion is overruled.

COSTS:

Motion Fee, $20.00, paid by John F. Holcomb, Rothman, Elliott, Boyd and Valen.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the
Court this ... day of ..... 19..
..... Clerk
..... Deputy

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

NO. CA77-07-0084

STATE OF OHIO,
Plaintiff-Appellee,

vs.

DONALD L. KORN,
Defendant-Appellant.

DECISION

(Filed April 4, 1979)

Mr. John F. Holcomb, Prosecuting Attorney, 310 Rentschler Building, Hamilton, Ohio 45011, for Plaintiff-Appellee,

Messrs. Walsh & Niehaus, James E. Walsh of counsel, 584 Nilles Road, Fairfield, Ohio 45014, and

Messrs. Elliott & Boyd, George H. Elliott of counsel, 1601 First Avenue, P. O. Box 1133, Middletown, Ohio 45042, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Butler County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and the arguments of counsel.

The defendant-appellant was indicted by the Butler County Grand Jury for the aggravated murder of one Mildred Ruth Doench on July 13, 1974. The indictment contained a specification that the offense was perpetrated while committing or attempting to commit rape contrary to R. C. 2929.04 (A) (7). Pleas of not guilty and not guilty by reason of insanity were entered. After examination, the defendant was found competent to stand trial. A motion to suppress evidence of all statements and writings of the defendant, and of property seized and tests made by police authorities, was filed on behalf of the defendant and was heard by a three judge tribunal. Following an extensive hearing, the panel entered its findings of fact and conclusions of law, and overruled the motion to suppress.

Thereafter, trial was had to the same panel, pursuant to waiver of trial by jury, and the defendant was found guilty as charged of aggravated murder while committing or attempting to commit rape. Subsequently, a mitigation hearing was had, after the tribunal overruled the defendant's motion attacking the constitutionality of the Ohio statutes providing for mitigation proceedings, and the defendant was sentenced to death, no mitigating circumstances having been found. Appeal was timely filed presenting four assignments of error for review.

Considering these assignments of error in an order reverse from that presented, we overrule the fourth assignment of error which raises an issue as to the propriety of evidence of a similar act following the act in question. We conclude that this assignment of error is without merit. *State* v. *Snowden* (1976), 49 Ohio App. 2d 7, 359 N.E.2d 87. The third assignment of error, attacking the constitutionality of the Ohio death penalty under the statutes providing mitigation standards and procedures, is conceded by the State to be meritorious in view of the holdings of

Lockett v. *Ohio* (1978), — U.S. —, 98 S.Ct. 2954; *Bell* v. *Ohio* (1978), — U.S. —, 98 S. Ct. 2977; *State* v. *Collins,* No. C-77614 (1st Dist. Mar. 7, 1979), and is sustained. The defendant's motion was required to have been granted, and the imposition of the death penalty was error. The second assignment of error, raising asserted error in the panel's application of the mitigation statutes, is mooted by our foregoing disposition of the third, and is accordingly overruled.

This leaves for extended consideration the defendant's first assignment of error, which asserts that the trial court erred in overruling the motion to suppress from the body of evidence his confession and his other inculpatory writings and statements. Five grounds are asserted in support of this assignment, one of which is, we conclude, dispositive of the issue. Those facts relevant to the immediate inquiry, derived from the hearing on the motion to suppress, are summarized in the following section.

I.

The defendant was arrested at 3:35 P.M. on January 27, 1975, by elements of the Jeffersonville, Indiana, police, in connection with an assault with intent to commit a felony perpetrated in that state. He was promptly given *Miranda* warnings in correct form, but did not volunteer any responses. He was then transported to the Jeffersonville jail and placed in custody. At 3:53 P.M., he was again read his constitutional rights by the same officer, a Lieutenant Kemp. Following this reading, Kemp testified for the State as follows:

Q. And what did he indicate at that time?

A. He stated that no, he wanted to contact an attorney first.

Q. All right. Did you have any further conversation with him that day, on January 27th?

A. No sir.

(T.p. 5)

On January 28, 1975, the defendant was arraigned on the Indiana felony charge of assault and battery with intent to commit a felony. He was there advised by the magistrate that, "Once a formal charge is filed against you either in this Court as a misdemeanor, or in the Circuit Court . . . as a felony, you may ask the presiding Judge to appoint the public defender to represent you." (T.p. 125). No inquiry was made as to the defendant's desire for counsel or ability to employ counsel, and no effort was made to furnish him with counsel.

On the following day, January 29, Lieutenant Kemp visited the defendant to apprise him of yet another Indiana warrant, again reminding him of his *Miranda* rights, and was later that day advised by the defendant that he wished to speak with members of his family and with a Major John Bohlen, an officer of the Butler County, Ohio, Sheriff's Department. Bohlen's department had previously, on January 27th, been notified by the Indiana authorities of the defendant's arrest[1] and Bohlen was present on the 29th to interrogate the defendant. This initial custodial interrogation by Bohlen, which was not preceded by additional *Miranda* warnings, consisted of attempts to convince Korn that his interests would best be served by telling what he knew of the Doench killing. The interrogation, which was recorded, included the following:

---

[1] The defendant had been questioned by the Ohio authorities at the time of the Doench murder in 1974, but, no evidence connecting him with the crime having developed, had not been arrested or charged.

Bohlen: And, of course, we still feel, and I told you before, we still feel that the only reason you won't talk to us on the Doench matter is because you have some knowledge of that killing. I still feel that way. In the State of Ohio, I don't know if you're aware of it or not, but if you have a need for some help, you can get it. And, for what its worth, I just want to tell you that we'll do everything we can to see to it that you get it. But you're going to have to level with us. No other way anybody can do anything for you unless you lay it out.

Korn: Well before I can go back over there I've got to get through this down here. Just gonna have to wait to see what happens down here. And from what the lawyer that Harold[2] contacted down here, and my mom and wife talked to yesterday, things don't look to good.

(T.p. 91-92)

Bohlen continued his questioning in an attempt to get the defendant to talk about the Doench killing:

Bohlen: Why don't you tell me the truth?

Korn: I have told you the truth.

Bohlen: Did you tell Indiana the truth?

Korn: Yes I did.

Bohlen: You didn't have anything to do with that either?

Korn: No, I did not. I haven't talked to Indiana on this girl yet down here that filed charges until I do consult a lawyer.

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2 That is, Harold Dance, a Middletown, Ohio, attorney, functioning as a friend of the Korn family and intermediary in securing Indiana counsel for Korn through the family.

Bohlen: Yeah, that's the same thing you told us up there. . . .

(T.p. 93-94)

Questioning continued without, however, any inculpatory statements from the defendant, who was finally removed from the interrogation room. The tape machine, however, continued its operation, picking up the following colloquy between Bohlen and someone unidentified:

Bohlen: God Damn! I believe I've about got him to where he is going to talk.

Unidentified voice: [unable to decipher conversation.]

Bohlen: I sent him out. I told him, "I'm through talking to you." Son-of-a-bitch! I hope this thing picked it up.

Unidentified voice: Did you shut it off?

Bohlen: No, I haven't done anything to it. I don't want to screw it up.

Unidentified voice: It's still going.

(end of tape recording) (T.p. 95)

On the following day, January 30th, there occurred a contretemps between the defendant's family, whom he had requested to see, the Indiana attorney hired by the family to represent Korn, and the Jeffersonville police, in which the attorney was first hired and then, under the impression that they, the family, had been told by the police that they would not be permitted to visit with Korn so long as Korn was represented by counsel — an assertion vigorously denied by the police — fired from this employment.[3]

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3 This attorney, and another, were subsequently rehired to represent Korn, but *after* the confession was given on the 30th.

Korn's sister testified that during the defendant's conference with his family in the jail, at which Major Bohlen was present, Korn was told that the family had to fire the Indiana attorney in order to be permitted to see him, and that Korn reiterated his need to be represented by counsel:

> Q. What, if anything, was said with respect to a lawyer for Donald?
>
> A. Well I asked Donnie, I said, Don, we hired you a lawyer but we had to let him go because they wouldn't let us see you. And he said, Sis, I know we can't afford a lawyer. And I said, Well you need — you've got to have a lawyer. He said, Yes, but we can't afford it and I can't afford one.
>
> (T.p. 204)

It is not clear whether the conversation was within the hearing of Major Bohlen, but Bohlen himself testified that at the conclusion of this family conference, he and the defendant had a conversation. This was after the defendant's family had discharged the attorney they had earlier hired to represent Korn, in the belief, they testified, that this was the only way they would be permitted to see Korn. The following is Major Bohlen's recollection of his discussion with Korn:

> Q. As far as you know, Korn didn't know he had a lawyer, is that right?
>
> A. Not to my knowledge, no sir.
>
> Q. But you did.
>
> A. Yes sir.
>
> Q. And when he asked you, "Do I need an attorney?" you said, "Well, I'm from the State of Ohio," isn't that right?
>
> A. That was a decision I couldn't make for him.

> Q. No, no. Wait a minute. He already had one. Don't you think that was a little strange request to make?
>
> A. Apparently he didn't know it.
>
> Q. Then why didn't you tell him?
>
> A. I don't think that was my place either.
>
> (T.p. 104)

This conversation was overheard by Lieutenant Kemp who confirmed the substance of it as related by Bohlen (T.p. 37-38).

By now, the Indiana attorney initially hired by the family to assist Korn had been discharged, and the family had gone home. Questioning was then resumed by Bohlen, Kemp, and two other officers in the late afternoon on the 30th, preceded by fresh *Miranda* warnings from a printed form and a waiver thereof signed by Korn. This form, unlike earlier verbal warnings administered by Lieutenant Kemp, omitted an instruction that he had an immediate right to appointed counsel in the event he could not engage one himself, and instead recited (after the usual and proper preliminaries):

> You have this same right [*i.e.*, to talk to a lawyer before and during questioning] to the advice and presence of a lawyer, even if you cannot afford to hire one. We have no way of furnishing you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.
>
> (State's Exhibits 5 & 6)

No verbal instructions were given to Korn then or thereafter which qualified this printed advice, or which indicated that Korn *then* had the right to counsel and that the

State was under an obligation then to furnish him one at his request.[4]

This session of questioning terminated without result for the State. Two hours later, at approximately 8:30 P.M., Bohlen returned to the interrogation room after being advised that Korn was ready to talk. A *Miranda* form identical to the foregoing was produced and a waiver signed by Korn. A full confession of the Doench murder followed, together with a map drawn by the defendant of the murder scene. After Bohlen finished with the defendant, the Indiana police continued the session, directed toward the charges in that state. When Korn had completed his statements, at the end of the session, he told the officers that we wanted an attorney.

> Q. . . . . Now after the end of your — the second statement he gave, the one he gave to you respecting the alleged offense in Indiana, he did at that time state that he wanted a lawyer did he not?
>
> A. [by Lieutenant Kemp] At the end of that statement, yes sir he did.
>
> (T.p. 48)

Subsequently, the police authorities brought Korn, now accompanied by attorneys re-engaged by the family, to the scene of the Ohio crime where, aided by the map, they retraced the crime and secured other statements from the defendant.

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[4] Because of our disposition of the defendant's first assignment of error on other grounds, it is unnecessary to decide whether this instruction, which seems to qualify the *Miranda* warnings in a rather material way, is insufficient in law to found a subsequently received confession. But see *U.S. ex rel. Williams* v. *Twomey* (7th Cir. 1972), 467 F.2d 1248.

II.

The defendant asserts, in the second argument advanced in support of his first assignment of error, that:

> Where an in custody defendant invoked his right to counsel but was not provided a lawyer, his subsequent uncounselled confession elicited by police-initiated interrogation, is inadmissible and subject to suppression.

We conclude, after reviewing the evidence as summarized above and the decisions following *Miranda* v. *Arizona* (1966), 384 U.S. 436, that we have no alternative but to agree with this proposition.

Thus, in *Miranda* the Supreme Court had held:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and indicates he wants one before speaking to police, they must respect his decision to remain silent.

Miranda, supra at 473-74. This language from *Miranda* was cited as controlling the disposition in the Court of Appeals for the Sixth Circuit of a case with distinct parallels to the instant appeal. In *Combs* v. *Wingo* (6th Cir. 1972), 465 F.2d 96, the suspect had been placed in custody

and had been read his constitutional rights. The interrogating officer then testified:

> "A. . . . . Then I asked him if he understood what these rights were and asked him if he would like to make a statement.
>
> D16. Did he reply to you?
>
> A. Yes. He said he would like to make a statement but he would like to talk to an attorney first."

Combs, supra at 97. Questioning nevertheless continued with the officer reading to the defendant an incriminating ballistics report.

> A. Mr. Combs started to cry and he put his head in his hands and he said those shoes that made the tracks are at daddy's, and I stopped him there —
>
> OBJECTION: MR. HUGHES:
>
> THE COURT: OVERRULED.
>
> A. And I stepped to the door and called Sergeant Gay and Sergeant Gay came in and kinda hunkered down beside the desk, and I said do I understand you now want to make a statement without an attorney and he said that is right. He was again advised that he didn't have to make a statement and he said I want to talk about this and I asked him are you saying you had something to do with Effie Haden's death? And he said yes, I did. . . ."

Combs, supra at 98. The Sixth Circuit Court of Appeals reversed the dismissal by the District Court of a petition for a writ of habeas corpus, and remanded with instructions to issue the writ "unless appellant is retried by the Commonwealth within a reasonable time without the introduction of any evidence of the unconstitutionally obtained confession or any evidence obtained therefrom." *Combs, supra* at 99.

Again, in *Brooks* v. *Perini* (N.D. Ohio 1973), 384 F. Supp. 1011, *aff'd* 497 F.2d 923 (6th Cir.), *cert. den.* 419 U.S. 998, the U.S. District Court for the Northern District of Ohio, Western Division, confronted a situation where the accused, during a custodial interrogation after receiving advice as to his constitutional rights, indicated his desire for the presence of an attorney. None being then available, questioning continued with inculpatory statements ultimately resulting. Entering an order for the conditional issuance of a writ of habeas corpus, the court stated:

> The record clearly shows that the petitioner requested the presence of an attorney, that he was not provided an attorney and that the interrogation continued after petitioner's request. The trial judge at the suppression hearing found that petitioner waived his right to counsel subsequent to his request by agreeing to continue with the questioning after being fully informed of his constitutional rights. The respondent advances that same argument in this action. If their conclusions are accepted, the constitutional protection promised by *Miranda* would indeed be illusory. Merely by continuing to seek a waiver of rights after a request by an accused for the presence of an attorney would be a most effective method of circumventing the guarantees of *Miranda*.

Brooks, supra at 1018. Commenting on the respondent's argument that the police did not "pressure" the accused during the interval of time they went in search of an attorney, the court noted:

> The "pressure" here came from the continued requests of the police and prosecutor that petitioner proceed with the statement without a lawyer. The

> requests took the form of continued advisement of *Miranda* rights, seeking a waiver of those rights by petitioner. The plain language of *Miranda* and *Combs* prohibits this pressure after an accused has requested the presence of an attorney during interrogation.

Brooks, supra at 1018. To similar effect, see *U.S. ex rel. Williams* v. *Twomey* (7th Cir. 1972), 467 F.2d 1248; *U.S.* v. *Slaughter* (4th Cir. 1966), 366 F.2d 833; *U.S.* v. *Fisher* (D.C. Minn. 1971), 329 F. Supp. 630; *State* v. *Word* (1969), 80 N.M. 377, 456 P.2d 210.

There is even the suggestion by the United States Supreme Court that, unlike the expression of a desire to remain silent, which *Miranda* does not require to be of indefinite duration, the desire to have the assistance of counsel may, once expressed, indefinitely preclude all further interrogation until counsel is finished. Mr. Justice White, in his concurring opinion in *Michigan* v. *Mosley* (1975), 423 U.S. 96, 109-110, stated:

> As the majority points out, the statement in *Miranda*, . . . at 474, requiring interrogation to *cease* after an assertion of the "right to silence" tells us nothing because it does not indicate how soon this interrogation may resume. The Court showed in the next paragraph, moreover, that when it wanted to create a *per se* rule against further interrogation after assertion of a right, it knew how to do so. The Court there said "[i]f the individual states that he wants an attorney, the interrogation must cease *until an attorney is present.*" [Emphasis in original.]

In footnote 2 of his concurring opinion, Justice White comments:

> The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

Applying these authorities to the instant appeal, it is clear, as a result of the testimony of the State's own witnesses, that the defendant at least twice and possibly as many as four times manifested his desire to be assisted by counsel. The first occasion followed Lieutenant Kemp's initial *Miranda* instructions on January 27. At that time, the defendant expressly indicated that he did not want to answer questions, that "he wanted to contact an attorney first." The second occasion, two days later following arraignment, was during an interrogation by Major Bohlen. The interrogator was attempting to secure a statement on the Ohio homicide, but Korn was concerned with the Indiana proceedings, and with the fact that the lawyers his family had contacted indicated that "things don't look too good." His concern with legal counselling was confirmed a moment later when he responded to a question about his answers to authorities on the Indiana offense by saying ". . . I havn't talked to Indiana on this girl down here filing charges until I do consult a lawyer." His interrogator acknowledged his familiarity with Korn's desire to have an attorney, stating, "Yeah, that's the same thing you told us up there. . . ."

After being informed by his sister the next day that the lawyer his family had earlier hired to represent him,

had been fired,[5] Korn reaffirmed to his sister his need for a lawyer and his fear that he could not afford one. He asked Major Bohlen, following his conference with his family, whether he needed an attorney, but Bohlen declined to advise him. Questioning resumed, ultimately with the result sought by the police, and concluding with a reiteration of his desire for the assistance of counsel.

We think it is clear from this record that the defendant had indicated in as positive and unequivocal a fashion as one under these circumstances could reasonably be expected to do, that he did not wish to respond to questioning until he was represented by counsel. The conclusions of law filed by the trial panel, reaching a contrary result, reveal to us either a misreading of the evidence, or a misunderstanding of the law, or both. Thus, the panel found:

> 3. The Court finds further that once Defendant indicated that he desired to obtain counsel, interrogation ceased.
>
> 4. The Court finds further the at no time during the interrogation which resulted in the statements in question, did Defendant indicate his desire for counsel.
>
> (T.d. 65)

The first of these conclusions is consistent with the undisputed evidence *only* if one argues that because interrogation ceased on January 27th after the first mention of the desire for counsel, that it could be fully resumed on

[5] The defendant vigorously argues that the police induced the attorney's discharge by telling the family that they could not visit Korn so long as he was represented by counsel. The police insist that what they said was misunderstood, that they said that they (the police) could not see him if he had an attorney. The trial panel found the latter to be the fact. Our disposition of the case on another ground moots our consideration of this issue, and its possible consequence on the motion to suppress.

any day thereafter. But, as was stated in *U.S.* v. *Slaughter* (4th Cir. 1966), 366 F.2d 833, 840-841:

> The fiat of the rule that we should announce in this case is subject to some qualification. The right to counsel, like most other constitutional rights, may be waived. But, as pointed out in . . . [citations omitted], waiver is an intentional relinquishment or abandonment of a known right or privilege. We find no waiver of the right to counsel. Here, appellant manifested his desire to exercise his right to counsel. For reasons of conscience or otherwise, he did not initiate additional conversation with agents of the F.B.I. about the matter with which he was charged, or the homicide they were investigating. His interrogation was initiated solely by the F.B.I. . . . Even if we disbelieve appellant's assigned reason why he thereafter permitted himself to be interrogated, there is nothing in this record to support an express change of mind on appellant's part of his desire to consult counsel, and a departure from his previously announced desire to exercise his right should not be lightly inferred. A statement that appellant had a right to remain silent, on the facts here, was insufficient to overcome the respect to which his expressed desire to consult was entitled.

As in *Slaughter*, we have examined this record in a fruitless search for anything which would indicate any demonstrable or even arguable change of mind on Korn's part of his desire, expressed on the 27th and 29th, to consult counsel. On the contrary, what we have found seems only to reinforce this desire.

The second of the panel's conclusions of law seems to attach significance to the absence of yet another expression of Korn's desire for counsel immediately preceding the second interrogation on the 30th, which resulted in the confession. We find no such significance. We do not read *Miranda* as requiring, once the privilege is claimed, the

defendant to endlessly repeat his request at endless interrogations. It is not necessary to adopt the *per se* rule suggested by Justice White in *Mosley, supra,* to find that, under the facts presented here, nothing occurred prior to the second period of questioning on January 30th which extinguished or vitiated the defendant's assertion of his desire for the presence of counsel, and the obligation of the authorities to respect it.

We conclude that the confession of guilt by Korn on January 30th should have been suppressed since it followed custodial interrogations held in disregard of his election to have the assistance of counsel, and that the trial panel erred in failing to so suppress the confession together with the map of the Doench premises and any other inculpatory material following the confession and which constituted the tainted fruit thereof. *Wong Sun* v. *U.S.* (1963), 371 U.S. 471; *Harrison* v. *U.S.* (1968), 392 U.S. 219; *U.S.* v. *Bayer* (1947), 331 U.S. 532.

We may be forgiven for noting that, in the instant case, we have no particular appetite for the result these mandates of law require of us. The crime involved here was particularly repellant and vicious; every decent individual recoils at a recitation of facts involved in this case. One's sympathy is not enlisted in considering the defendant's case. But these are considerations we do not have the luxury of indulging. The law has established certain procedures which must be followed in cases of custodial interrogation, and has established penalties for transgression of the procedures. We sit here to apply that law, not to indulge our preferences.

The defendant's first assignment of error is sustained, the judgment is reversed, and the cause is remanded for further proceedings consistent with this decision.

PALMER, P. J., BETTMAN and BLACK, J. J.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
BUTLER COUNTY, OHIO

NO. CA77-07-0084

STATE OF OHIO,

Appellee,

vs.

DONALD L. KORN,

Appellant.

JUDGMENT ENTRY

Entered ———

/s/ KEEFE, Presiding Judge

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Butler County Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are well taken in part for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Butler County, Ohio, be, and the same hereby is, reversed and remanded for further proceedings consistent with this decision.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellee, by its counsel, excepts.

APPENDIX C

STATE OF OHIO, BUTLER COUNTY
COURT OF COMMON PLEAS

CASE NO. CR76-06-0306

STATE OF OHIO,

Plaintiff,

vs.

DONALD L. KORN,

Defendant.

FINDINGS OF FACT and CONCLUSION OF LAW

(Filed May 4, 1977)

Cramer, Marrs, Riley — J.

Mrs. Ruth Doench was murdered in Butler County, Ohio on July 13, 1974.

Defendant Donald L. Korn was indicated by the Butler County Grand Jury, May Term, 1976, for Aggravated Murder with specification for the murder of Ruth Doench.

On September 29, 1976, Defendant entered pleas of not guilty and not guilty by reason of insanity to the indictment and on October 13, 1976, Defendant filed a motion to suppress evidence which motion was amended March 14, 1977 and the matter is now before the court upon the motion to suppress as amended.

The court having heard the evidence the arguments of counsel and has considered the briefs of counsel and comes now to its findings.

FINDINGS OF FACT

1. The Defendant was arrested by Indiana authorities on January 27, 1975 and incident to the arrest was fully advised of his Miranda Rights at 3:35 p.m. on that date.

2. At 3:53, on the same date, the Defendant was again fully advised of his Miranda Rights, as a part of the booking process in Indiana.

3. At that time Defendant acknowledged the warnings and his understanding of these warnings.

4. He indicated he did not wish to talk to anyone, and no one talked to him that day.

5. Defendant advised his wife by phone that day of his arrest.

6. On January 28, 1975, at 9 a.m. Defendant was taken before Judge Jacobs for preliminary arraignment, and was further advised by Judge Jacobs of his Constitutional rights.

7. On January 29, 1975, Captain Kemp again advised him of his rights under the Miranda rulings and talked with defendant at his request.

8. On January 30, 1975, Defendant's family came to Indiana to visit him and retained counsel, one Forrest Lanning, to represent Defendant.

9. Subsequently, Lanning was discharged by the family, under the impression they say that they could not talk with Defendant while he had counsel, although it is disputed by police officers that they were ever told this.

10. At 6:25 p.m., January 30, 1975, Maj. Bohlen, a Butler County, Ohio Deputy, in the presence of other officers again warned Defendant of his rights from a printed police department form. In part, these warnings were: "You have the same right to advice and presence of a

lawyer, even if you cannot afford to hire one." Defendant indicated that he understood his rights.

11. Defendant then made an oral statement followed by a later recorded statement taken only after an additional warning of Miranda rights.

12. On February 1, 1975 the Defendant's sister again employed Mr. Lanning to represent the Defendant.

13. On February 2, 1975, Defendant in the company of his counsel, voluntarily returned to Ohio with Ohio police officers and viewed several scenes allegedly involved in the Doench murder.

CONCLUSIONS OF LAW

The Court comes now to its conclusions of law based on the facts as previously set forth herein:

1. The Court finds that the Defendant was fully advised of his Constitutional rights and further that he voluntarily knowingly, and intelligently waived his right to counsel.

2. The Court further finds from the facts set forth that no coercion was employed by the police officers in obtaining the statements sought to be suppressed by this amended motion, nor was he prevented from conferring with counsel.

3. The Court finds further that once Defendant indicated that he desired to obtain counsel, interrogation ceased.

4. The Court finds further that at no time during the interrogation which resulted in the statements in question, did Defendant indicate his desire for counsel.

Having fully set forth its findings of fact and conclusions of law upon the motion the Court, in accordance with

these findings, rules that the motion is not well taken and is therefore overruled.

The rulings of the Court are unanimous.

An entry may be prepared in accordance with these findings and conclusions.

Enter this —— day of May, 1977.

/s/ ROBERT L. MARRS,
Judge Presiding

/s/ FRED B. CRAMER,
Judge

/s/ PAUL E. RILEY,
Judge

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, BUTLER COUNTY

CASE NO. CR76-06-0306

STATE OF OHIO

Plaintiff

vs.

DONALD L. KORN

Defendant

ENTRY

(Filed February 13, 1979)

This cause came on to be heard before this court, com-

posed of three judges as provided in Section 2945.06 of the Ohio Revised Code, upon the Defendant's motion to suppress, as amended, filed herein, and the court, having considered the evidence adduced herein, the arguments and memoranda of counsel, and the law, does hereby unanimously find that said motion is not well taken.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's motion to suppress as amended be and is hereby overruled.

ENTER

/s/ ROBERT L. MARRS
JUDGE

/s/ FRED B. CRAMER
JUDGE

/s/ PAUL E. RILEY
JUDGE

NUNC PRO TUNC: May 4, 1977

APPROVED AS TO FORM:

/s/ JOHN F. HOLCOMB
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

APPENDIX D

Donald Lee KORN, Appellant,

v.

STATE of Indiana, Appellee.

No. 876S273.

Supreme Court of Indiana.

Aug. 14, 1978.

Michael J. McDaniel, New Albany, for appellant.

Theo. L. Sendak, Atty. Gen., Daniel Lee Pflum, Deputy Atty. Gen., Indianapolis, for appellee.

PIVARNIK, Justice.

Following a jury trial in the Clark Circuit Court on April 21, 1976, appellant Korn was convicted of inflicting injury in the commission of a robbery, commission of a crime while armed, to-wit, rape, and commission of a crime while armed, to-wit, robbery. For these crimes, Korn was sentenced to life, thirty years, and twenty years imprisonment, respectively.

The incident in question occurred on January 24, 1975. On this date, the appellant broke into the home of a woman, D.H., and slashed her throat five times. He then ordered her into a utility room where he raped her twice and forced her to commit sodomy. Korn then fled the

home taking the victim's purse containing fifteen dollars. The victim later identified Korn as her assailant at a police line-up and at trial. Also, Korn gave the police a statement in which he admitted committing the acts in question.

This appeal presents four issues for our review. These issues concern: (1) the validity of the charging information; (2) the admission into evidence of appellant's confession; (3) the admission into evidence of the victim's purse which was located as a result of Korn's confession, and; (4) the trial court's denial of appellant's Motions for Directed Verdict made at the end of the state's case-in-chief and at the close of all evidence.

I.

As his first assignment of error, the appellant claims that the trial court was without jurisdiction over this case because the charging information was not signed by the prosecutor in compliance with Ind.Code § 35-3.1-1-2 (b) (Burns 1975). The relevant portion of this statute requires that:

> "The information shall be signed by the prosecuting attorney or his deputy and sworn to by him or by any other person."

The copy of the information contained in the record bears two signatures by the deputy prosecutor. The first signature was made in attestation to the oath of the affiant, Ronald Kemp. The second signature, follows the phrase "Approved by me." As the signatural requirements of the statute were complied with, there is no error presented in this issue.

II.

The appellant next argues that the trial court erred in denying his Motion to Suppress a statement he gave to police. Korn claims that the confession was not freely, knowingly, and voluntarily given, and that it was obtained by police unlawfully.

The relevant facts surrounding the giving of the statement are as follows. Korn was taken into custody on the afternoon of January 27, 1975, pursuant to a preliminary charge of assault and battery with intent to commit a felony on one K.A. The next day Korn was taken before the Jeffersonville City Court in relation to the preliminary charge. City court judge, George Jacob, advised Korn of his constitutional rights including the right to an attorney. Judge Jacob further advised appellant that once formal charges were filed, either in the circuit court as a felony or in the city court as a misdemeanor, he could request that the presiding judge appoint the public defender to represent him if he could not afford a private attorney.

On the evening of January 29, 1975, the appellant was arrested in his jail cell pursuant to a bench warrant issued by the Clark Circuit Court for the rape, robbery and injury inflicted upon D.H., the victim in the present case. Korn was allowed to call his family that night and requested their presence at the jail. He also asked to see Larry White, an old family friend and retired police officer.

Larry White and Korn's wife, mother and sister left their Ohio homes the morning of January 30, 1975, arriving in Jeffersonville at around 11:30 a. .m Before going to the jail, the family retained a local attorney who said he would meet them at the police station. The family then proceeded to the jail where they met with Detective Ron Kemp and Major Bohlen, an Ohio policeman, at

approximately noon. At this point the testimony conflicts. The family and Mr. White claimed that the police told them that they could not see Korn since they had hired a lawyer. The officers stated that what they actually told the family was that the police, not the family, would be unable to speak with Korn after an attorney was retained. The officers further testified that the family and White did, in fact, meet with the appellant from approximately 12:30 p. m. to 2:00 p. m. Following this meeting, the family went out for lunch after unsuccessfully trying to locate the attorney. Upon his arrival at the jail at 4:00 p. m., the attorney was notified of his discharge. The attorney counselled the family for fifteen minutes then left. The family and Mr. White then met with Korn before returning to Ohio at about 5:30 p. m.

After finishing dinner, Korn executed a written advice and waiver of rights form. At approximately 8:00 p. m., the appellant told Detective Kemp that he recalled what he had done in Ohio and in Jeffersonville. The appellant became very emotional at that point. Detective Kemp left the room to get Korn a cup of coffee and related the appellant's remarks to Major Bohlen, an Ohio police officer. Major Bohlen then entered the room and advised appellant of his rights. Korn signed a written waiver form and proceeded to give Bohlen a statement concerning his involvement in an Ohio homicide. This statement was concluded at approximately 9:30 p. m. Detective Kemp returned to the room and Korn was again advised of his rights. The appellant executed a third waiver of rights form and made the confession which is at issue in this appeal.

The appellant admits that he was fully advised of his rights. He could hardly contend otherwise in light of the fact that in addition to the three written waivers he

signed, he was also advised of his rights at the time of his initial arrest, at the subsequent booking, at the preliminary hearing, upon his arrest for the offenses against D.H. and by Detective Kemp when Kemp visited Korn's cell on the night of January 29. Rather, the essence of Korn's argument is that his confession was involuntary because: his will to resist questioning deteriorated due to the lapse of time between his initial arrest and the giving of the confession, and; because his right to counsel was frustrated by the actions of the police officers.

This court has held in several decisions that a delay in presenting a defendant before a magistrate does not make a confession inadmissible as a matter of law, but rather is one factor to be considered in the question of admissibility. *Murphy* v. *State,* (1977) Ind., 369 N.E.2d 411, 415; *Sanders* v. *State* (1972) 259 Ind. 43, 284 N.E.2d 751; *Green* v. *State,* (1971) 257 Ind. 244, 274 N.E.2d 267. In the present case, the period of delay extended from the time of appellant's arrest in his jail cell on January 29, until his confession the following night; a period of approximately twenty-four hours. Although appellant was initially arrested on January 27, he was promptly brought before a judge on the preliminary charges the next day. Thus, only the period of detention following appellant's second arrest can arguably be deemed unlawful. The Appellant relies upon *Williams* v. *State,* (1976) Ind., 348 N.E.2d 623, in support of his position that the trial court should not have admitted his confession into evidence. In *Williams,* this court suppressed a confession which was found to be the result of an illegal detention of sixty-eight hours. However, *Williams* involved several factors which are not present in this case: an arrest without either a warrant or probable cause, deficient *Miranda* warnings and the absence of any circumstances interven-

ing between the arrest and the confession which would have shown the statement to be a product of defendant's free will. In this case, Korn does not challenge the legality of his arrest or the sufficiency of the *Miranda* warnings he received. There is no evidenced presented, beyond appellant's bare assertion, that the length of detention caused Korn's will to resist questioning to deteriorate. On the other hand, there is much evidence showing his willingness to talk and cooperate with police and do so in the absence of an attorney. Thus, the length of detention in this case does not make appellant's confession inadmissible.

With respect to the appellant's argument that he was denied his right to counsel, there is no question that a defendant can waive his right to have an attorney present when making a statement, just as he can waive any other right. *Murphy* v. *State, supra.* However, where the assistance of counsel is waived and a statement is taken, a heavy burden rests on the state to show that such waiver was knowing and intelligent. *Miranda* v. *Arizona,* (1966) 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694, 724. Significantly, the record in this case shows that at no time did Korn ever state that he wanted an attorney despite the fact that he was informed of his right to counsel on at least eight separate occasions. To the contrary, Korn stated that he was leaving all decisions up to his family and was going on the advice of Mr. White. Mr. White had advised Korn to talk with police and that he, Korn, might not need a lawyer. Although Judge Jacob arguably should have made inquiry into appellant's indigency at the preliminary hearing, *Fulks* v. *State,* (1970) 255 Ind. 81, 85, 262 N.E.2d 651, 653, such error was harmless since Korn was not, in fact, an indigent. Finally, the fact that appellant did not wish to have counsel prior to questioning is reinforced by the content of a three-way telephone con-

versation he had with his wife, Dorothy, and his mother, Calla Mae Bayne, immediately following the confession. This conversation was taped by police and, in relevant part, was as follows:

> Dorothy: Okay, your mom is on the other phone.
>
> Korn: Okay, well like I said, I've made a complete confession.
>
> Calla Mae Bayne: You what honey?
>
> Korn: I made a complete confession. After talking with this Lieutenant here for about two hours . . . It all came back, I know what I did . . . I did do it . . . But I know what I'm doing, I think. There's been no threats, no nothing . . . I tell you what, I feel like hell, but I feel a hundred percent better now.
>
> Calla Mae Bayne: It's the best thing you could have ever done then.
>
> Korn: I think it is too.
>
> Calla Mae Bayne: Donnie are you glad, still glad we didn't get an attorney to fight it?
>
> Korn: Yes, I am."

We find that this evidence, when viewed as a whole, was sufficient to establish a knowing and voluntary waiver by appellant of his right to counsel before questioning.

Thus, there was no error in admitting the appellant's confession into evidence.

III.

The appellant next contends that the trial court erred in admitting into evidence the purse belonging to the victim which appellant took from her home. Korn claims that since the purse was located as a result of his confession, it should have been excluded from evidence as the fruit

of an unlawfully procured statement. In light of our holding in issue II, *supra,* that the confession was not unlawfully obtained, appellant's contention is without merit. There was no error in admitting the purse into evidence.

IV.

The appellant's final argument concerns the trial court's denial of his Motions for Directed Verdict at the close of the state's case-in-chief and at the close of all evidence. The appellant proceeded to present evidence in defense following his first motion, and thus any error in the court's ruling on such motion is waived. *Downs* v. *State,* (1977) Ind., 369 N.E.2d 1079, 1081. Appellant's sole claim with regard to the denial of his Motion for Directed Verdict is that the state failed to prove that the injuries inflicted upon the victim were committed in the furtherance of a robbery. Appellant's argument is essentially an invitation for this court to reweigh the evidence. This, we will not do. Rather, we look at only the evidence most favorable to the state and the reasonable inferences to be drawn therefrom. A verdict will not be disturbed if there is substantial evidence of probative value from which the trier of fact could reasonably infer that the defendant was guilty beyond a reasonable doubt. *Mosley* v. *State,* (1977) Ind., 366 N.E.2d 648, 649. The evidence showed that Korn broke into the home of the victim where he slashed her throat five times. After twice raping the victim and forcing her to commit sodomy, the appellant fled from the home with her purse containing fifteen dollars. We find that this evidence satisfied our standard for reviewing sufficiency questions.

APPENDIX E

STATE'S EXHIBIT 20

STATEMENT

30th day of January, 1975
8:40 (PM)

I Donald L. Korn give the following voluntary statement to Lt. Ron Kemp who has identified himself as a Police Officer of the Jeffersonville Police Department, Jeffersonville, Indiana.

I have been advised that no statement is required and if so given, it can be used against me in court. I have been advised of my right to consult an attorney prior to making a statement by Maj. J. Bohlen, Butler County, Ohio Sheriff's.

No threats or promised have been used in obtaining this statement.

Present in addition to the officer named above are Sgt. Jack Whittingil of the Jeffersonville, Indiana Police Department, and Detective Larry Castator of the Butler County, Ohio Sheriff's Department.

Your Name is Donald L. Korn: Right,

Q. Where do you live? Ans. 801 Vinnedge Avenue, Fairfield, Ohio.
Q. You are in the Office of Detective Lt. Ron Kemp of the Jeffersonville Police Department? Ans. That's Correct.
Q. There are no guns present? Ans. None at all
Q. You're not under any duress? Ans. None at all

Q. No threats have been made against you? Ans. No
Q. You're here voluntarily? Ans. That's correct
Q. You're not under the influence of any narcotic drug, any hallucinogen, or the influence of alcohol? Ans. None whatsoever
Q. Now before we begin, Let me read you your rights as they pertain to this questioning, you understand that this is Detective Larry Castator of the Butler County Sheriff's Office, (Yes) I am John Bohlen, also of the Butler County Sheriff's Office, This is Detective Lt. Ron Kemp, of the Jeffersonville, Indiana Police Department? (Yes)
Q. All Police Officers,
Q. You understand that you have a right to remain silent, you need not talk with us at all, you have, you understand that anything you do say, should you choose to make a statement can and will be used against you in a court of law?, you understand that you have the right to talk to a lawyer for advice before we ask you any questions, and to have an attorney present with you here during the questioning, you understand that you have a right to end the questioning at any time you so desire, and should you decide to answer the questions now, and later decide you want a lawyer present; you have a right to stop and ask for the attorney, you have a right to call off the questioning at any time; Do you understand those rights? ans. Yes
Q. You have read them, and you understand them? Ans. Yes.
Q. OK, If you'll sign indicating you have read the statement, and understand them (Korn signs statement, see attached)
Q. Now there is a waiver underneath there that says, I have read this statement of my rights and I under-

stand what my rights are, I am willing to make a statement and answer questions, I do not want a lawyer. I understand, and know what I'm doing, no promises or threats have been made to me; and no pressure or coercion of any kind has been used against me. Do you understand that? Ans. Yes

Q. Will you sign that waiver then? (Korn signs waiver, see attached)

Q. OK, Mr. Korn, now having acknowledged your rights and having waived and having decided to make a statement to us, we would like to have you tell us everything you can recall as best you can recall it, of the night of July 13, 1974.

Ans. That afternoon, approximately 1:00 O'Clock I left my house, I went * * *

JPD Form Legal Statement Page 1 of 7 pages.

/s/ Det. LARRY A. CASTATOR

I have been advised by Maj. J. H. Bohlen BCSO that in the event this case goes to court and I do not have money to hire an attorney, the Judge will appoint an attorney for me.

I understand that at the time I committed the above acts, I violated the law. I have read the above statement and have had it read to me and it is true and correct.

/s/ D. L. KORN
Signature